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No. 93-67

In The

Supreme Court of the United States

October Term, 1993

JOHN A. HARRIS,

Petitioner,

vs.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Pennsylvania Rule of Professional Conduct which forbids in-person solicitation by attorneys unconstitutionally deprives Petitioner of his claimed First Amendment right of commercial speech?

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The Respondent, Office of Disciplinary Counsel of the Supreme Court of Pennsylvania, opposes the grant of a Writ of Certiorari on the Petition of John A. Harris.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner is essentially correct. However, it presents certain ambiguities which should be clarified. Discipline was imposed upon the Petitioner not simply because of his actions on December 18, 1990.

Disciplinary action was instituted because the Petitioner stated his intention to continue in-person solicitations without limit. (Appendix F, paragraphs 8 and 9). Disciplinary action was instituted to prevent continuing repetitions of in-person solicitations by the Petitioner. Consequently, the stipulation as to the nature of Petitioner's conduct with his potential clients on December, 18, 1990 does not apply to any other date and is not to be extended to future solicitations.

It should be noted that the proposed imposition of an Informal Admonition does not impair or restrict the ability of an attorney to practice law. However, multiple and continuing infractions of the contested rule would, more than likely, result in discipline limiting or suspending the Petitioner's right to practice law.

REASONS FOR DENYING THE WRIT

I.

THE FACTUAL BASIS IS TOO NARROW.

The Petition's factual basis is too narrow for the Court's decision to substantially affect the rights of the Petitioner or the Respondent or others similarly situated.

While Respondent confirms that Petitioner used no coercion, duress or harassment on the stipulated day of December 18, 1990, that stipulation does not apply to any other day. Specifically, it does not apply to Petitioner's stated intention to continue in-person solicitations into the future without limit. Neither does the stipulation characterize or refer to Petitioner's conversations outside the courtroom after the initial confrontation. There are no facts of record as to the nature of the in-person solicitation for which the Petitioner seeks approval. A decision that Petitioner's conduct cannot be punished would be limited to the exact facts

stipulated to. It would not decide the rights of either the Petitioner or the Respondent prospectively. Other factual situations, such as whether the communication conducted outside the courtroom was accurate, complete, candid and unhurried cannot be decided on this record. A decision on the Writ would either have minimal value or would have to based on hypothetical facts and be, in effect, an advisory opinion.

Petitioner's mixture of Rule of Professional Conduct 7.3(a) with Rule 7.3(b) is misplaced. The two Rules are independent of each other. They regulate two different ways of marketing attorney's services. Rule 7.3(b) regulates written communication from attorney to prospective client. On the other hand, Rule 7.3(a) is an almost complete proscription against in-person solicitations.

The history of the enactment of Rule 7.3(a) and 7.3(b) by the Supreme Court of Pennsylvania makes their independence clear. Rule of Professional Conduct 7.3(b) was enacted and effective on April 1, 1988. At that time, Rule of Professional Conduct 7.3(a) was "reserved." The reason for the reservation was that *Bates v. Arizona* prevented the reenactment of the predecessor to Rule 7.3(a) which had forbidden advertisement by lawyers. In April, 1988, the case of *Shapero v. Kentucky Bar Association,* 486 U.S. 466, 108 S. Ct. 1916 (1988) was then pending in the Supreme Court of the United States. The Supreme Court of Pennsylvania therefore decided to wait until the decision in *Shapero* so it could draft a rule that would be compatible with both *Bates v. Arizona* and whatever the decision in *Shapero v. Kentucky Bar Association* might be. *Shapero* was decided on June 13, 1988. That decision was examined by the Pennsylvania Supreme Court which determined that this Court had not retreated from the principles of *Ohralik.* It then enacted Rule 7.3(a) effective November 7, 1988. It is a serious misconstruction to suggest that Rule of Professional Conduct 7.3(a) is "modified" by Rule of Professional Conduct 7.3(b). Neither is modified, reduced or expanded by the other.

II.

THE PETITION SEEKS RE-EXAMINATION OF RECENTLY CONSIDERED ISSUES.

The Petition seeks a re-examination of issues recently considered by this Court.

In order to declare Pennsylvania's rule forbidding in-person solicitation by attorneys unenforceable, the Court would have to reverse *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S. Ct. 1912 (1978). *Ohralik,* was recently cited with apparent approval in the matter of *Endenfield v. Fane,* 113 U.S. __, 113 S. Ct. 1792, 61 Law Week 4431 (April, 1993). Petitioner asks the Court to disregard the distinction between accountants and attorneys and apply the rule of *Endenfield* to attorneys.

Respondent believes that *Ohralik* was properly decided and should not be overruled. Respondent agrees with the cautions and conditions described and enumerated in *Ohralik* as reasons why in-person solicitation by attorneys is undesirable as a matter of public policy. In addition, Respondent believes that if an attorney is permitted to make in-person solicitation, then he must be permitted to hire others to make in-person solicitation on his behalf. Supervising, controlling and policing such solicitations would be impossible. The public's interest in obtaining undistorted, uncolored, candid and complete information about its alternatives under our legal system would be in grave jeopardy.

Like *Ohralik,* this Petitioner believes that his conduct is to be judged and regulated by the harm that was actually caused. This is an incorrect standard.

> Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting

> solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the state seeks to avert.

Ohralik v. Ohio, 436 U.S. 447, 464.

Consequently, the lack of demonstrated harm is no defense to the violation of the Rule. Unless the recent citations of *Ohralik* are misleading and the Court is prepared to overrule it, issuing the Writ would serve no purpose.

CONCLUSION

Respondent, Office of Disciplinary Counsel, respectfully requests that this Honorable Court deny the requested Writ of Certiorari.

Respectfully submitted,

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